Supreme Court, U.S.
FILED
DEC 16
CLERK

(15)

No. 96-320

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioner,

v.

MICHAEL BUCKLEY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS*

The Port Authority of New York and New Jersey ("Port Authority") is a body corporate and politic created in 1921 by a Congressionally-consented-to Compact between the States of New York and New Jersey to develop public transportation, terminal, and other facilities of commerce within the statutorily defined Port District. 42 Stat. 174 (1921), *consenting to* 1921 N.J. Laws ch. 151 *and* 1921 N.Y. Laws ch. 154. The Compact is codified at N.Y. Unconsol. Laws §§ 6401-23 (McKinney 1979). At the present time, pursuant to the 1921 Compact and subsequent bi-State legislation, the Port Authority owns and/or operates thirty-three (33) such facilities, including, through its wholly-owned subsidiary, the PATH interstate railway system. *See* N.Y. Unconsol. Laws § 6612 (McKinney 1979).

The operation of the PATH system is regarded as an essential governmental function for the benefit of the people of New York and New Jersey. N.Y. Unconsol. Laws § 6610 (McKinney 1979). As an interstate railway system, PATH is often a defendant in cases brought pursuant to the statute at issue, the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §§ 51-60. Hence, the interests of *Amicus* are directly affected by the ruling of the Second Circuit at issue in the instant case.

The Port Authority is particularly concerned about the impact on it, and on other similarly situated companies and public authorities, of the kind of vague and open-ended liability imposed on rail operators by the Second Circuit. If a worker who suffers no physical injury can nevertheless recover for the negligent infliction of emotional distress under FELA, simply and solely because the plaintiff was negligently exposed to pollutants or toxic substances in the workplace, railroads will be faced with vastly expanded, and

possibly devastating, potential tort liability. *Amicus* asserts that the result upsets the carefully crafted remedial scheme that FELA represents and undoes the limitations on recovery for emotional distress inherent in that scheme that were set out by this Court in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). Accordingly, the Port Authority respectfully submits the instant Brief *Amicus Curiae* pursuant to Rule 37(4) of the Rules of the Supreme Court.

STATEMENT OF THE CASE

Amicus adopts the statement of the case set forth in Petitioner's brief.

SUMMARY OF ARGUMENT

FELA has a broad remedial purpose and it is appropriate to interpret it liberally. The Second Circuit, however, has exceeded the liberality of Congress and ignored the admonitions of this Court by erroneously establishing a "physical impact" rule that would permit employees negligently exposed to asbestos to sue for emotional distress. The ruling is punitive rather than compensatory in its intent and effect. Furthermore, the Second Circuit's holding that medical monitoring awards are permissible violates the statutory language of FELA, which limits recovery to cases of actual injury. In short, the ruling below was designed to address an unusual set of allegations, but did so in a way that potentially has broad and unfortunate implications for the entire railroad industry. For these reasons, *Amicus* respectfully submits that the ruling should be overturned.

ARGUMENT

I. THE COURT BELOW HAS ADOPTED A RULE OF LAW GOVERNING THE NEGLIGENT INFLICTION OF EMOTIONAL HARM IN FELA CASES THAT IS INCONSISTENT WITH THIS COURT'S INTERPRETATION OF THE STATUTE, AND IGNORES THE NEED TO TAKE INTO ACCOUNT NOT ONLY A PLAINTIFF'S INTERESTS, BUT ALSO A DEFENDANT'S LEGITIMATE NEED FOR PROTECTION AGAINST FRIVOLOUS SUITS AND UNPREDICTABLE AND OPEN-ENDED LIABILITY

In the decision below in *Buckley v. Metro-North Commuter Railroad*, 79 F.3d 1337, 1344-45 (2d Cir.), *cert. granted*, 117 S. Ct. 379 (1996), the Court of Appeals for the Second Circuit ruled that a plaintiff suing under FELA may recover for emotional distress and medical monitoring if he or she has been "physical[ly] impact[ed]" by asbestos fibers, even though the plaintiff has not developed, and, fortunately, as statistics indicate, probably never will develop, any disease as a consequence of that exposure. *Amicus* respectfully submits that this reading of the law is in derogation of the rule recently established by this Court in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), is inconsistent with the common law, and poses a serious economic threat to all rail operators subject to FELA.

Claims of negligent infliction of emotional distress are recognized as compensable in modern tort law, but not without, at the same time, generating considerable anxiety about the potential for serious mischief that would be posed if the right to recover for this tort were too broadly defined.

As this Court observed in *Gottshall*, claims for emotional distress divorced from physical injury pose risks both of fraud and of the trivialization of the legal process through the proliferation of insignificant disputes. 512 U.S. at 545. Even more serious is the risk that "allowing such suits can lead to unpredictable and nearly infinite liability for defendants." *Id.* at 552.

In light of these concerns, and in an effort to remain faithful to the intent of Congress in enacting FELA -- "to provide compensation for the injuries and deaths caused by the *physical* dangers of railroad work," 512 U.S. at 555 (emphasis added) -- this Court limited recovery under the Act for emotional distress to those plaintiffs who could show that they fell within a "zone of danger," *i.e.*, that they were threatened with imminent physical peril. *Id.* at 556. *Amicus* respectfully refers this Court to Point II of Petitioner's brief which amply demonstrates that the Second Circuit's "physical impact" analysis, *see Buckley*, 79 F.3d at 1343-45, distorts the "zone of danger" test adopted in *Gottshall*.

This Court's adoption of the "zone of danger" test frankly recognizes that even individuals who indisputably have suffered serious, palpable emotional scarring as a result of negligence may nonetheless be without legal redress because their situation does not place them within a narrowly delimited class of permissible claimants. Although the result can be harsh toward some plaintiffs, this Court noted in *Gottshall* that it was required to reach such a result by the need to balance the interests of plaintiffs and defendants in a

way that respects the objectives of Congress in enacting FELA. 512 U.S. at 557. Thus, this Court stated:

> Our FELA cases require that we look to the common law when considering the right to recover asserted by respondents, and the common law restricts recovery for negligent infliction of emotional distress on several policy grounds: the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability. Although some of these grounds have been criticized by commentators, they all continue to give caution to courts. *We believe the concerns that underlie the common-law tests, and particularly the fear of unlimited liability, to be well founded.*

Id. (emphasis added).

As this Court recognized in *Gottshall*, the state courts, operating under common law, have recognized that the need for predictability and a reasonable restriction on the scope of potential liability demands that this cause of action be carefully limited -- despite the fact that some convincing claims of harm will be left without redress. *See* 512 U.S. at 545-46; *see also Thing v. La Chusa*, 771 P.2d 814, 815 (Cal. 1989) (*in bank*) (repeatedly cited with approval by this Court in *Gottshall*); *Bovsun v. Sanperi*, 461 N.E.2d 843, 847 (N.Y. 1984); *Boucher v. Dixie Med. Ctr.*, 850 P.2d 1179, 1182 (Utah 1992).

Unfortunately, in deciding *Buckley,* the Second Circuit forsook the teaching of this Court and gave no heed to this Court's effort to keep liability under FELA for negligent infliction of emotional distress within reasonable bounds. As a result, entities such as the *Amicus* may face wholly incalculable levels of future liability unless this Court corrects the Second Circuit's error and reverses its ruling.

If the Second Circuit's ruling stands, any employer who is found inadvertently, but negligently, to have allowed its employees to be exposed to a harmful pollutant or toxic substance, such as asbestos, is likely to be liable to each and every person so exposed for emotional harm and for medical monitoring. Clearly, under the Second Circuit formulation, recovery will not even be limited to cases in which there is a showing of severe distress. The Second Circuit was quite willing to allow a plaintiff with "injuries" like the Respondent's to recover, even though the court openly conceded that the "evidence of Buckley's emotional distress is not overwhelming." *Buckley,* 79 F.3d at 1346.

II. THE COURT BELOW REACHED A WRONG AND PUNITIVE RESULT

In truth, what seems to have motivated the Second Circuit to reach its erroneous interpretation of the applicable legal standard is not some basic disagreement with the proposition that a tort like the negligent infliction of emotional distress needs carefully and narrowly defined boundaries. Rather, it seems to have occurred as a result of the Second Circuit's reaction to Respondent's allegations of egregious wrongdoing on the part of his employer.

More specifically, the Court of Appeals describes the Respondent as emerging from the steam tunnels under Grand Central Station day after day so covered with white asbestos dust that he and his co-workers were dubbed the "'snowmen of Grand Central.'" *Id.* at 1340. *Buckley* is described as "an unusual case" involving an exposure to asbestos that was "massive, lengthy, and tangible" and, furthermore, the allegations are that this exposure occurred with the knowledge of Metro-North and without any prior warning to the workers. *Id.* at 1340, 1345. Indeed, the Court of Appeals was sufficiently upset by these allegations that it openly acknowledged being unmoved by the possibility that its holding could lead to a "flood of litigation." *Id.* at 1345. Clearly the Second Circuit was outraged by the allegations regarding Metro-North's behavior. Quite tellingly, the Court remarked:

> We do not believe that the magnitude of Metro North's wrong should limit the damages awarded against it.

Id. It is precisely this sense of outrage that most pointedly demonstrates the erroneous nature of the Second Circuit formulation and the need for reversal. *Amicus* respectfully submits that liability for negligent infliction of emotional distress under FELA should not depend on perceptions, right or wrong, of the egregiousness of a defendant's conduct.

However distasteful the picture of the Petitioner's behavior, as presented in the opinion below, it should be remembered that it is only that -- a picture painted by the Respondent's presentation alone. *See Buckley*, 79 F.3d at 1342. In reality, the facts of the case have yet to be determined. No ultimate findings of fact exist because the District

Court directed a verdict for Metro-North at the close of the Respondent's case. *Buckley v. Metro-North Commuter R.R.*, No. 89 Civ. 7170-A, 1995 WL 110380, at *1 (S.D.N.Y. Mar. 15, 1995), *vacated*, 79 F.3d 1337 (2d Cir.), *cert. granted*, 117 S. Ct. 379 (1996). And most importantly, no issue of liability or damages based on any claim of intentional wrongdoing was before the Second Circuit. On the contrary, the sole issues the court was asked to address were whether, based on simple negligence, Petitioner could be required to compensate its employees for (i) emotional distress and (ii) medical monitoring if they are exposed to asbestos at some indeterminate level above normal background amounts. *See Buckley,* 79 F.3d at 1342, 1346.

Amicus wishes to point out that instead of limiting itself to the narrow issues legitimately before it, the Second Circuit seems to have allowed its distaste for Petitioner's conduct to support a vast departure from and distortion of the traditional principles of tort law. The holding that workplace exposure to asbestos constitutes a "physical impact" sufficient to sustain a claim of negligent infliction of emotional distress, in addition to being legally flawed, serves the purpose of punishing Metro-North rather than compensating Respondent. After all, Respondent complains of no physical injury and can offer no evidence of clinical disease. Indeed, the Second Circuit acknowledged that "Buckley cannot demonstrate a probability that he will develop an asbestos-related disease." *Buckley*, 79 F.3d at 1343 n.1. Moreover, Respondent does not even claim severe emotional distress -- only anger and anxiety. *Id.* at 1341. The court itself admitted that the evidence of Respondent's emotional distress was "slim." *Id.* at 1346.

III. IRRESPECTIVE OF WHETHER THE "PHYSICAL IMPACT" STANDARD FOR IMPOSITION OF LIABILITY IS CORRECT, RECOVERY FOR MEDICAL MONITORING COSTS IS NONETHELESS INAPPROPRIATE

Compensation for medical monitoring is not a remedy for a claim of existing emotional distress. It is intended to deal with a different issue, *i.e.*, the risk that a physical ailment will develop at a future date. But because the disease does not exist at the time of the suit, requiring railroads to compensate workers for ongoing monitoring is incompatible with the statutory requirement of FELA that plaintiffs be permitted to recover only for actual injuries.

More specifically, FELA provides that

> [e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . .

45 U.S.C. § 51.

Nearly a half century ago, this Court in *Urie v. Thompson*, 337 U.S. 163, 170 (1949), interpreted this statutory language to hold that a worker exposed to a potentially harmful substance was not injured within the meaning of FELA. In accord is *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.), *cert. denied,* 474 U.S. 864 (1985).

Luckily, most exposures to harmful or toxic substances in the workplace and elsewhere will never result in the development of disease in most people. And in the case of those unfortunate enough to suffer adverse consequences, the expression of illness may not occur -- as has been the experience with asbestos -- until decades after the time of exposure. If employers subject to FELA are required to pay for future medical monitoring for every employee who stands even a slightly increased statistical risk of developing an illness related to workplace exposure, employers will become the suppliers of regular medical checkups for vast numbers of present and past employees at an astronomical potential cost. This Court clearly said in *Gottshall:*

> That FELA is to be liberally construed . . . does not mean that it is a workers' compensation statute. We have insisted that FELA "does not make the employer the insurer of the safety of his employees . . . ."

512 U.S. at 543 (citation omitted). Quite clearly, the rule enunciated by the Second Circuit would go well beyond even what caused this Court concern in *Gottshall.* It would, in effect, turn the employer into a medical insurer.

Not surprisingly, *Amicus* is unaware of precedent establishing that workers' compensation laws, which, as does FELA, ordinarily require "injury"[1] as a predicate to recovery, go as far as the Second Circuit's ruling extends FELA. And certainly the common law of torts generally has not demanded that employers engage in medical monitoring -- particularly in cases where the Respondent has, as his own experts

[1] *See, e.g.*, N.Y. Work. Comp. Law § 10 (McKinney 1992).

testified here, at most a five percent (5%) risk of ever developing an asbestos-related disease. *Buckley*, 79 F.3d at 1341. *See Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1371 (S.D. W. Va. 1990), *aff'd sub nom. Ball v. Joy Techs., Inc.*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).

As the District Court most persuasively stated in *Ball*:

> There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants.

755 F. Supp. at 1372.

Thus, *Amicus* respectfully submits that were employer liability for medical monitoring, under the circumstances presented in *Buckley*, to become a generally-accepted remedy under FELA, employers such as *Amicus* would face incalculable costs. Moreover, should the common law courts take heed of this Court's admonition in *Gottshall* that common law principles inform its FELA analyses, 512 U.S. at 540, 541-42, 557, and the *Buckley* remedy thereby become common to the law of torts, the court system itself, as the *Ball* court recognized, could be overwhelmed by the ensuing great increase in levels of litigation.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully urges the Court to reverse the judgment of the Second Circuit Court of Appeals and remand with directions to enter judgment as a matter of law in favor of Petitioner.

Dated: New York, New York
December 13, 1996

Respectfully submitted,

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